

**Kaiser Foundation Health Plan of Colorado and
United Food and Commercial Workers Union,
Local No. 7.** Case 27–RC–7964

March 9, 2001

DECISION ON REVIEW AND ORDER
BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN AND HURTGEN

The issue presented in this case is whether a nonincumbent union may represent a residual unit of employees at a non-acute-care health facility. In light of our decision in *St. Mary's Duluth Clinic Health System*, 332 NLRB No. 154 (2000), and for the reasons discussed below, we conclude that a nonincumbent union may petition for an appropriate residual unit of employees at a non-acute-care health facility.

BACKGROUND

On October 14, 1999, the Regional Director for Region 27 dismissed the Petitioner's petition seeking a unit consisting of three classifications of employees in the Employer's eyecare department at its medical facilities—a portion of the residual unit of unrepresented technical employees. In accordance with Section 102.67 of the Board's Rules and Regulations, the Petitioner filed a timely request for review of the Regional Director's Decision, and the Employer subsequently filed a brief in opposition. The Petitioner's request for review is granted.

Having carefully reviewed the case, including the undisputed facts and the briefs of the parties, and in light of our decision in *St. Mary's Duluth Clinic Health System*, supra—in which we determined that a nonincumbent union may represent a residual unit of employees at an acute-care hospital—we conclude that the instant petition should be processed.

FACTS

The Employer is a non-profit corporation providing prepaid comprehensive health services—including inpatient hospital services, outpatient care, and additional benefits such as pharmaceuticals, contact lenses, and eyeglasses—to participating members in the Denver metropolitan area. Among the Employer's various facilities are 18 outpatient medical offices—at which medical services are provided—and a regional support services facility, which contains the Employer's optical laboratory, pharmacy operations, medical reference laboratory, and storerooms.

A number of the Employer's employees are currently represented by a labor organization. The Petitioner represents approximately 1000 professional employees in two separate units, and the Service Employees Interna-

tional Union (SEIU) represents a broad unit consisting of approximately 1600 non-professional healthcare employees (including technical, service, and clerical employees). Each of these units is a multi-facility unit that includes all the employees in covered classifications at all of the Employer's facilities in the Denver area. The Petitioner now seeks to represent a unit consisting of 3 classifications of technical employees¹ in the Employer's eyecare department²—certified optical dispensers, optical dispensers, and a team leader. In addition to those employees sought by the Petitioner, the Employer's eyecare department includes 66 technical, service, and clerical employees—who are represented by the SEIU as part of the broad nonprofessional unit—and 31 professional employees, who are represented by the Petitioner in one of its professional units. All of the employees in the eyecare department are therefore represented, with the exception of the 29 employees in the three job classifications sought by the Petitioner, and an additional 12 technical optical employees who work in the laboratory or stockroom at the support facility.³

The Regional Director, upon an examination of traditional community-of-interest factors, concluded that the optical dispensers, laboratory employees, and stockroom employees share a community of interest with the service and technical employees represented by the SEIU, and that they do not have a sufficiently distinct community of interest to justify a separate unit.⁴ The Regional Director

¹ The Regional Director indicated that the parties agreed that all of the petitioned-for employees were technical employees.

² The Employer operates a single regionwide eyecare department, which provides vision care services at 10 of the Employer's 18 medical offices.

³ These 41 unrepresented eyecare department employees are the Employer's only unrepresented employees engaged in healthcare-related work.

⁴ With regard to the optical dispensers, the Regional Director relied upon the facts that, inter alia: (1) the experience and education requirements for the optical dispenser position mirror those of other technical employees, including some of those represented by SEIU; (2) the certified optical dispenser position, as with several of the higher-level technical positions contained in the SEIU unit, requires certification by examination; (3) the optical dispensers and other technical employees work the same hours and have no significant difference in their wage rates; and (4) the optical dispensers and other technical employees are subject to the same departmental policies and support the same professional staff. Additionally, in concluding that the laboratory and stockroom employees share a community of interest with the optical dispensers as well as the employees represented by the SEIU, the Regional Director relied on the following facts: (1) all of the eyecare department employees are ultimately subject to the same departmental supervision by the eyecare business manager, despite the fact that the stockroom employees, the lab employees, and the optical dispensers have separate immediate supervision; (2) the lab and stockroom employees provide support for the optometry and optical services at all of the Employer's medical offices providing vision services; (3) all employees in the eyecare department, regardless of job classification,

thus found the 41 unrepresented technical eyecare employees to be residual to the existing SEIU service and technical unit.

The Regional Director concluded, however, applying the Board's decision in *Levine Hospital of Hayward, Inc.*, 219 NLRB 327 (1975), that the residual employees in the instant case could appropriately gain representation only through a petition for an overall unit or a petition by the incumbent union to add the residual employees to its existing unit. Since the Petitioner indicated that it did not wish to proceed to an election in an overall unit including all of the technical employees, the Regional Director dismissed the petition.

ANALYSIS

In our recent decision in *St. Mary's*, involving an acute-care facility covered by the Board's Health Care Rule,⁵ we overruled *Levine* and found that a non-incumbent union may petition to represent a residual unit of employees.⁶ Although the instant case is not governed by the Health Care Rule—since the Employer is not an acute-care provider—the principles and analyses articulated in *St. Mary's* are equally applicable to petitions for residual units at nonacute-care health facilities.⁷ In the instant case, the 41 eyecare department employees are

perform clerical duties, including the completion of paperwork/reports and scheduling of appointments; (4) the optical dispensers and lab and stockroom employees all receive the same benefits (including vacation, sick leave, health coverage, and other insured benefits), and the dispensers and lab employees receive the same wages; and (5) experience in optical dispensing is a basic job requirement for the lab employees.

⁵ The Rule provides that “[e]xcept in extraordinary circumstances and in circumstances in which there are existing nonconforming units,” the 8 units enumerated in the Rule will constitute the only appropriate bargaining units in acute-care hospitals. 29 C.F.R. § 103.30(a).

⁶ As explicated more fully in *St. Mary's*, the conclusion that a non-incumbent union may represent a separate unit consisting of all unrepresented residual employees effectuates the Board's long-standing policies of according deference to collective-bargaining relationships and promoting labor stability, and preserves the sec. 7 rights of the unrepresented residual employees to pursue bargaining representation.

⁷ Analysis of the propriety of a residual unit at a nonacute-care health facility, however—in contrast to an acute-care facility, for which the Board's Health Care Rule specifically delineates appropriate bargaining units—requires consideration of an additional factor relating to the community of interest among employees. When a union petitions for a separate unit of employees of an employer with a partially represented workforce, the Board initially “determine[s] whether the petitioned-for employees share a separate and distinct community of interest apart from the represented unit employees. If the community of interest of the petitioned-for employees is not separate and distinct such that they could not constitute an appropriate separate unit, the Board then determines whether they constitute an appropriate residual unit.” *Carl Buddig and Co.*, 328 NLRB No. 139, slip op. at 2 (1999). In the instant case, the Regional Director specifically found that the 41 unrepresented technical employees do not have a sufficiently distinct community of interest to justify a separate unit, and no party has challenged that finding.

the Employer's only unrepresented healthcare employees and are residual to the existing SEIU non-professional unit. Therefore, we find that a unit consisting of these 41 employees constitutes an appropriate residual unit and that the Petitioner may petition to represent the unit.⁸

Accordingly, we remand this case to the Regional Director to process the petition. On remand, the Regional Director should ascertain the Petitioner's interest in representing a residual unit that differs from the unit for which it petitioned and, additionally, determine whether the Petitioner possesses the requisite showing of interest in such unit. In the event that the Regional Director ultimately directs an election among a unit of residual employees, the incumbent union—consistent with the limited exception we adopted in *St. Mary's*—should be afforded the opportunity to appear on the ballot if it so desires, without having to demonstrate the traditional showing of interest. If the incumbent union chooses to be included on the ballot, the employees in the unit will have the opportunity to choose (1) to be represented by the petitioning union in a separate unit, (2) to be represented by the incumbent union as part of its unit, or (3) not to be represented.

ORDER

The Regional Director's Decision and Order is reversed, and the case is remanded to the Regional Director for further action consistent with this decision.

MEMBER HURTGEN, dissenting.

In *St. Mary's*, 332 NLRB No. 154 (2000), I disagreed with my colleagues' decision to add another nonconforming unit to an extant nonconforming unit.¹ That is, an incumbent union represented only some of the technical employees, and the Board's decision permitted a different union (petitioner) to seek to represent another unit of some technical employees. I dissented because my colleagues' decision violated Section 103.30(c) of the Health Care Rule, it was inconsistent with Board precedent, and it was at odds with the Congressional admonition against undue proliferation of units in the health care industry.

In the instant case, *St. Mary's* is extended to a facility that is not covered by the Health Care Rule. Thus, the decision in this case (unlike *St. Mary's*) does not involve a violation of the Rule. However, it does involve the overruling of precedent (*Levine Hospital*, 219 NLRB

⁸ The Regional Director properly concluded that any residual unit must necessarily include all unrepresented employees of the type covered by the petition. See *Carl Buddig and Co.*, supra, slip op. at 2; *Fleming Foods, Inc.*, 313 NLRB 948, 950 (1994).

¹ A nonconforming unit is one that does not conform to the units set forth in the Health Care Rule.

327, on which the Regional Director relied), and the decision is also at odds with the Congressional admonition against undue proliferation of units in the health care industry. In addition, as my colleagues concede, the employees involved herein do not have a sufficiently dis-

tinct community of interest to justify a separate appropriate unit.² Accordingly I dissent.

² See fn. 7 of majority opinion.